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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>SHADAE HILAI SCHMIDT,<br><br>Defendant and Appellant. | B163496<br><br>(Los Angeles County<br>Super. Ct. No. BA212291) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc E. Turchin, Supervising Deputy Attorney General, Robert D. Breton, Deputy Attorney General, for Plaintiff and Respondent.

## I. INTRODUCTION

Defendant, Shadae Hilai Schmidt, appeals from her voluntary manslaughter conviction. (Pen. Code,[1] § 192, subd. (a).) The jury also found that defendant personally used a firearm in the commission of the killing. (§ 12022.5, subd. (a)(1).) Defendant argues the trial court: improperly denied her motion to summon a new jury panel as required by *People v. Wheeler* (1978) 22 Cal.3d 258, 281-282; failed to instruct the jury on involuntary manslaughter; admitted evidence of prior misconduct and the fact that she was adopted; and excluded evidence of a prosecution witnesses' prior misdemeanor conviction. Defendant also argues that the prosecutor committed misconduct.

## II. FACTUAL BACKGROUND

### A. The Events Leading Up To The Killing

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) Defendant was Verna Schmidt's adopted daughter. Dr. Ozel Brazil, founder and director of the Los Angeles Community Outreach Program affiliated with the First African Methodist Episcopal church, was a close friend of Ms. Schmidt. Ms. Schmidt had been a parent volunteer in his program, which assisted at-risk high school students in securing college admission and funding, and was a church trustee. Defendant was also active in the church and had graduated from Dr. Brazil's program. Defendant was a marginal high school student, but had the potential to succeed in college. Dr. Brazil wrote letters of recommendation to various

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

colleges for defendant, including Tuskegee University in Alabama. Defendant attended college there in the year 2000.

Defendant was suspended from Tuskegee University in December 2000. Thereafter, she was involved in a fight with Empress McBride. Ms. Schmidt was very upset about defendant's suspension.

Greta Hicks, a residence hall director at Tuskegee University, spoke telephonically with Ms. Schmidt several times about defendant's suspension. Ms. Schmidt seemed very hurt and was crying during their telephone conversations. Defendant's friend, Michael Ellison-Lewis, was also a student at Tuskegee University. Mr. Ellison-Lewis spoke with defendant about her suspension. Defendant beat Ms. McBride during a fight. Defendant believed the suspension resulted from falsehoods spread by Ms. McBride. Defendant also told Mr. Ellison-Lewis that Ms. Schmidt would not pay for transportation back to Los Angeles. Ms. Schmidt decided that defendant would either have to enroll at Philander Smith College or go into the military.

A few days prior to the murder, Nada Nickens, defendant's next-door neighbor, heard Ms. Schmidt "yelling and cussing." An older man was also present. Ms. Schmidt yelled, "She's got to go." The following day, Ms. Nickens saw defendant in the laundry room. Defendant appeared "buzzed" and smelled like marijuana. Defendant had a "joint" in her hand. Shortly thereafter, Ms. Nickens heard an argument between Ms. Schmidt and defendant.

Allen Moore lived across the street from Ms. Schmidt's house. Mr. Moore could see the front of Ms. Schmidt's house from his front window and yard. Mr. Moore observed defendant during the weeks prior to Ms. Schmidt's murder. Mr. Moore saw Deondre Belton and Damien Holland visiting defendant at Ms. Schmidt's house on a daily basis during that time. Defendant and the two men often sat on the front porch playing loud rap music. Mr. Belton and Mr. Holland visited defendant on the day before Ms. Schmidt was found murdered.

Mr. Belton knew defendant from high school. When defendant returned from college, he "hung out" with her at their residence. They also smoked "weed" and drank liquor together. Prior to the time Ms. Schmidt was murdered, defendant asked Mr. Belton a "couple times" if he knew where she could buy a gun. Defendant told Mr. Belton she had been suspended from school and had a fight while at college. Mr. Belton believed defendant wanted the gun for protection. Mr. Belton and two other friends went to defendant's house the day before Ms. Schmidt was murdered. They drank liquor and smoked "weed." Mr. Belton told Los Angeles Police Detective Kelly Cooper, "[S]he wanted to kill the bitch who got her kicked out of school." Mr. Belton also told Detective Cooper that defendant said she was dating a gang member from another area. A few days before the murder, defendant also asked Wali Akbar, a high school friend, where she could get a gun. Defendant told Mr. Akbar that some girl was "messing with her" and she needed to protect herself.

Dr. Brazil had three conversations with Ms. Schmidt on January 11, 2001. The last conversation took place between 6:30 and 7 p.m. Ms. Schmidt's voice seemed "different" during that last conversation. During Ms. Schmidt's final conversation with Dr. Brazil, the following was revealed: she had not previously been candid with Dr. Brazil; Ms. Schmidt had worked out a "deal" to get defendant into another school; Ms. Schmidt needed a letter of recommendation for defendant from Dr. Brazil; Ms. Schmidt was upset with defendant; this arose from the fact "scroungy" people were associating with defendant; Ms. Schmidt, who was desperate and angry, stated, "I'm tired of this crap"; and Ms. Schmidt wanted to confront defendant in front of Dr. Brazil on January 11, 2001, the day of their last conversation. Dr. Brazil described Ms. Schmidt's statements as follows, "[S]he was going to let [defendant] have it and let her know she was not going to put up with it anymore and that she had had it and if this was the case and [defendant] didn't like it, she could get out of her life." Ms. Schmidt wanted to confront defendant that day. However, Dr. Brazil was unable to get away for such a meeting on January 11, 2001.

Beverly Thomas worked with Ms. Schmidt at the Los Angeles County Department of Children and Family Services. Ms. Thomas met with Ms. Schmidt on January 11, 2001, between 5 p.m. and 5:20 p.m. Roger Lee Morrow also worked with Ms. Schmidt. Ms. Schmidt telephoned Mr. Morrow at his home at about 9:23 p.m. on January 11, 2001. Mr. Morrow's caller identification mechanism indicated Ms. Schmidt's home telephone number and her name. They spoke for approximately six minutes. Mr. Morrow heard defendant's voice in the background. Mr. Morrow was familiar with defendant's voice. Defendant sounded annoyed with Ms. Schmidt.

Irma Edwards was a good friend of Ms. Schmidt for over 15 years. They were like sisters. Defendant was like a daughter to Ms. Edwards. Ms. Schmidt never indicated that she was dating anyone. After the Tuskagee University suspension, Ms. Edwards suggested defendant transfer to Philander Smith College. Ms. Edward's daughter had attended Philander Smith College. Ms. Schmidt told Ms. Edwards that defendant would either attend Philander Smith College or go into the military. Ms. Schmidt telephoned Ms. Edwards from home at approximately 7 p.m. on January 11, 2001. Ms. Schmidt wanted information regarding where to stay near Philander Smith College. Ms. Edwards said she would call back later. Ms. Schmidt said she would be home all evening. When Ms. Edwards called Ms. Schmidt's home at approximately 10:15 p.m., defendant answered the telephone. Defendant indicated she was almost packed. Defendant said Ms. Schmidt was in the residence. Defendant called out to Ms. Schmidt indicating "Auntie Irma" was on the phone. Defendant told Ms. Edwards Ms. Schmidt would call right back. However, Ms. Schmidt never returned the call to Ms. Edwards.

Isis Jones and Joy Simmons paid a surprise visit to defendant at approximately 10:30 p.m. on January 11, 2001. Ms. Jones was a long time friend of defendant. Ms. Jones knew defendant was leaving for school the following day. No one responded to Ms. Jones's knock on the door. Using a cellular phone, Ms. Jones called defendant. The lights and television were on in the living room. Defendant said she had been sleeping. Defendant then opened the door for Ms. Jones and Ms. Simmons. Defendant

said Ms. Schmidt was asleep. Defendant went to Ms. Schmidt's bedroom and said that "Joy" and "Isis" were there. Ms. Jones did not hear any response. Defendant was wearing sweats and a T-shirt. Ms. Jones and Ms. Simmons visited with defendant in the living room for approximately one hour. During that time, Ms. Jones did not see or hear Ms. Schmidt.

B. Discovery of Ms. Schmidt's Body

At approximately 5 a.m. on January 12, 2001, Los Angeles Police Officer Arturo Ramos responded to an emergency call of a shooting. Defendant was outside the house when the officers arrived. Officer Ramos found Ms. Schmidt lying on her back in a rear bedroom. Ms. Schmidt was dead. There was a pool of blood around Ms. Schmidt's head, which appeared coagulated. The blood appeared to have been there for a while. The television was on in the living room. The heat was on in the house and it was extremely warm. When the officers first arrived, defendant was crying out loud hysterically. After the officers entered the house, defendant was seen talking to people in the street as if she were socializing. Defendant did not appear to be concerned. She was not crying and appeared unusually calm.

Ms. Schmidt died as the result of four gunshot wounds to the head. Ms. Schmidt died 8 to 18 hours prior to 1:30 p.m. on January 12, 2001, when the coroner's investigator took measurements. The police found no forced entry into Ms. Schmidt's home. The house was not ransacked. No valuables were missing.

C. Defendant's Statements to the Police

Defendant was first interviewed by Los Angeles Police Detectives Greg Kading and Daryn Dupree on the morning of January 12, 2001. Defendant told the detectives that she was switching schools from Tuskagee University to Philander Smith College

because she had not done well during the last semester. Defendant said she got three C's and a D. Defendant said that she had a 4.0 grade point average all of her life and graduated with a 3.998 from the magnet school at Alexander Hamilton High School in 1999. Defendant said Ms. Schmidt was "a little upset." Defendant's grandmother, Ms. Schmidt's mother, had recently died. Ms. Schmidt believed defendant's problems at Tuskagee University resulted from the stress related to the grandmother's death. Defendant said no one had been dating Ms. Schmidt. No one knew defendant had been adopted. Defendant said she had been sick for over a week. She had been packing to leave for school on Saturday. Ms. Schmidt awoke defendant on Thursday. Ms. Schmidt promised to take defendant shopping in the evening. Ms. Schmidt called defendant at approximately noon. Defendant was reminded to take her medicine. Ms. Schmidt came home between 4:45 and 5 p.m. Defendant and Ms. Schmidt went to the bank, where they withdrew approximately $500. They dropped off some papers and went to buy a jacket. However, they were unable to find the size defendant needed. Ms. Schmidt complained of an upset stomach. Ms. Schmidt decided to go home and resume their shopping after work the following day.

At approximately 6:30 p.m., Ms. Schmidt went out to meet "Thomas." Defendant described Thomas as a light-skinned man in his sixties. Defendant left the house approximately one-half hour later with her friend "Brian." Defendant said that she met Brian the previous summer on a bus and had gone out with him three times. Brian was scheduled to leave for Wilberforce University in Ohio, where he was a junior, on January 12, 2001. Brian was 21 years old. Defendant did not know Brian's last name, telephone number, or address. Defendant said she had a boyfriend named Dontay McDay, whom she met at Tuskagee University. Mr. McDay was from the east side of Los Angeles near Normandie.

Defendant said she and Brian went to Ralph's, Burger King, the Beverly Center, and a Wherehouse store. Defendant later corrected herself that they stopped at a Von's rather than a Ralph's store. Defendant said they drove around, went towards the pier, but

changed their mind because it rained. They drove to a park on La Cienega Boulevard, where they sat and talked. At approximately 2 a.m., defendant went back to her house to change clothes and shoes. The television was still on in the living room as she had left it. Ms. Schmidt's car was there. Brian waited in the car. Defendant knew her mother would not want her to go back out. As defendant left, she yelled, "Mom, I'm gone again." Ms. Schmidt did not respond. Defendant locked the front door when she left. Defendant and Brian drove back to the same park.

When defendant returned home the second time, the door was unlocked. Defendant went into the kitchen. Defendant noticed it was "stuffy" in the house as though the heater was on. She lit an incense stick. Defendant then saw Ms. Schmidt on the floor. Defendant called the police. The police operator told defendant to check Ms. Schmidt's neck for a pulse. Defendant did so and reported that Ms. Schmidt had no pulse and did not appear to be breathing. The police operator told defendant to try to blow into Ms. Schmidt's mouth. But defendant was unable to open Ms. Schmidt's mouth. Defendant could not touch Ms. Schmidt anymore. Defendant got some towels to try to stop the bleeding. Defendant then went to a neighbor's home. Defendant gave the telephone to the neighbor to speak to the police operator.

Defendant did not believe Ms. Schmidt owned a gun. Defendant said Ms. Schmidt had never touched a gun. Defendant did not believe "Brian" had a gun. Defendant denied recently arguing with Ms. Schmidt. When asked again about the reason she was not returning to Tuskagee University, defendant stated it was because of her grades. When asked if she got in trouble at Tuskagee University, defendant admitted that she had been in "a couple of fights." Defendant claimed to have fought with a girl named Laura. When confronted with a letter regarding her suspension from Tuskagee, defendant admitted that she had been suspended, and that Ms. Schmidt was mad.

Defendant was advised of her rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, 444. Defendant indicated she understood her rights and wished to give up her right to remain silent. When asked if she want to speak to an attorney, defendant

asked, "What would I need one for?" Defendant then agreed to continue to speak to the detectives without an attorney being present. Defendant said Brian's phone number was on a small piece of paper in a phone book. Defendant said that Brian was going back to Wilberforce University that morning and needed to be at the airport at approximately 7:45 a.m. Attempts by Detectives Cooper and Kading to locate someone named "Brian" who was traveling to Ohio that morning by checking with the airport were unsuccessful. Detective Cooper was able to locate defendant's address book at her home. However, he was unable to locate a small piece of paper on which a phone number would have been written.

When defendant was interviewed a second time a few hours later, she again denied having shot Ms. Schmidt. Defendant stated she did not know who shot her mother and did not suspect anyone. Defendant related similar details regarding the previous day's events.

During a third interview, defendant claimed to have left home before Ms. Schmidt had departed with the unidentified man. Defendant said she met Brian on the bus in early December. Defendant said she had lied about Brian coming to her house prior to January 11, 2001. When defendant left the residence, Ms. Schmidt was sorting jewelry in the dining room. Ms. Schmidt sold jewelry at shows. Brian had introduced himself to Ms. Schmidt before they left. Defendant and Brian returned at 2 a.m. and again at approximately 5 a.m. Brian came inside the house to get a drink of water. Ms. Schmidt was sorting out jewelry in the dining room. When defendant went into the bathroom, she heard gunfire. Defendant came out of the bathroom and fell to the floor. Brian told defendant to hold the gun. Brian kicked Ms. Schmidt in the back as she tried to crawl to her room. Brian put a pillow over Ms. Schmidt's face. Brian told defendant that if she said anything he would do the same to her. Brian went into the dining room and put the jewelry into a suitcase and left. Defendant described Brian as: about 20 or 21 years old; 5 foot, 6 inches tall; stocky but slender; and wearing a goatee and sideburns. Defendant said Brian: lived with his great-aunt and grandmother; had a one-year-old daughter; was

uncertain whether he was the biological father of the baby; and he was going through blood testing in order to resolve the paternity issue. All three interviews with defendant were recorded. The redacted tapes of the emergency call and the interviews were played for the jury at trial.

Brian Nichols knew defendant from the First African Methodist Episcopal church since she was approximately 12 and he was 14 years old. Mr. Nichols attended Wilburforce University in Xenia, Ohio. Wilburforce University is a small school with approximately 600 to 1,000 students. Mr. Nichols was in contact by email and telephone with defendant while he was at Wilburforce University and she was at Tuskagee University. Mr. Nichols was 21 years old in 2001. Mr. Nichols was 5 feet, 6 inches tall and weighed approximately 160 to 165 pounds. He wore sideburns and sometimes a goatee. Mr. Nichols lived with his grandmother near Normandie Avenue and the Interstate 10 highway. Mr. Nichols's girlfriend had a child, which she led him to believe was his. Mr. Nichols had considered the possibility of taking a blood test to determine paternity of the child. Mr. Nichols was living and working in San Diego the first three weeks of January 2001. Mr. Nichols had seen defendant at a church function during the 2000 holidays.

Carolyn Piles was a friend and co-worker of Ms. Schmidt. Ms. Piles had lunch with Ms. Schmidt on January 11, 2001. Ms. Piles testified concerning Ms. Schmidt's plans for Friday, January 12, 2001, "She told me that she would see me tomorrow." A mutual friend telephoned Ms. Piles shortly after 6 a.m. on January 12, 2001, and related that Ms. Schmidt had been shot. Ms. Piles dressed and went to Ms. Schmidt's house. Defendant spoke with Ms. Piles. Ms. Piles described their conversation as follows: "She told me that she had been out with a friend named Jennifer until about 2:30 in the morning when Jennifer dropped her off. She said that she went into her house and she told her mother, Mom, I will be back. And she left. And she said when she came back the door was ajar and that is when she found her mother."

Thomas Hartsock was a vice president manager of the Wells Fargo Bank at Broadway and Spring Streets. Mr. Hartsock's review of Ms. Schmidt's banking records revealed that she had three accounts at Wells Fargo Bank. The records revealed that there were no deposits or withdrawals on any of the accounts on January 11, 2001.

Defendant told the police that she had a 4.0 grade point average. Johnnie Ausbon, Dean of Students at Dorsey High School, testified defendant only had a cumulative grade point average of 1.19. Defendant's school records also reflected that she took the Scholastic Aptitude Test 6 times and never got above a score of 760. Defendant told the detectives that she did not know what happened to the gun after Brian made her hold it. A .38 caliber revolver was found in a shoe box in defendant's bedroom dresser. Subsequent tests of the bullet fragments taken from Ms. Schmidt's head were identified as having been fired from the revolver found in defendant's bedroom dresser.

## III. DISCUSSION

### A. Jury Selection

Defendant argues the trial court improperly denied her "*Wheeler*/*Batson*" motion. A mistrial was declared in the initial trial in this case after the jury indicated they were deadlocked. Defense counsel made a pretrial motion before the second trial which essentially put the prosecutor on notice that the defense would bring a *Wheeler* motion at the first opportunity if African-Americans were peremptorily challenged. During the course of voir dire in this case, defense counsel made a *Wheeler* motion, arguing: "Your Honor, I would at this time be making a Wheeler against the prosecutor for removing a Black man unconstitutionally. [¶] I did present authority to the court prior to trial as to the fact that the court can look at the percentage of African-Americans in the jury box and determine—as well as the percentage of something else. And I would submit that one of the Black men that was removed actually indicated that he was biased against the

defense." Defense counsel then argued: "We have only had two [Black males], and the People have excused both of them." The trial court responded: "So I think that's sufficient for a prima facie case. [¶] So now it's up to you to make a record just as to [those two jurors]."

Thereafter, the prosecutor gave his reasons for exercising the peremptory challenges. The trial court noted: "Also, as you recall, [prospective juror No. 10] was the gentleman who had a good friend who apparently was charged with murder and is serving time. [¶] I find that he's nondiscriminatory in his peremptory challenges. Therefore the Wheeler motion is denied at this time."

Defense counsel made another *Wheeler* motion after another African-American, juror No. 0438, was excused by the prosecution. The trial court denied the motion because another African-American male replaced that juror. When the other African-American juror was peremptorily challenged by the prosecution, defense counsel renewed his *Wheeler* motion. The trial court found a prima facie case had been made. Thereafter the prosecutor again explained the reasons for the two peremptory challenges. The trial court found the prosecutor had articulated race-neutral reasons for the peremptory challenges and noted that prospective juror No. 10 may have known some of the witnesses involved in the case.

The California Supreme Court has held that the exercise of peremptory challenges to eliminate prospective jurors on the basis of race violates the state Constitution. (*People v. Williams* (1997) 16 Cal.4th 635, 662-663; *People v. Alvarez* (1996) 14 Cal.4th 155, 192-193; *People v. Turner* (1994) 8 Cal.4th 137, 164; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) A defendant who contends the prosecution has excused prospective jurors for impermissible reasons, has the burden of establishing "a prima facie case of purposeful discrimination." (*People v. Williams*, *supra*, 16 Cal.4th at p. 663; accord, *People v. Mayfield* (1997) 14 Cal.4th 668, 723; *People v. Arias* (1996) 13 Cal.4th 92, 134-135.) The California Supreme Court has held that there is a presumption that a prosecutor uses peremptory challenges in a constitutional manner. (*People v.*

*Alvarez*, *supra*, 14 Cal.4th at p. 193; *People v. Turner*, *supra*, 8 Cal.4th at p. 164; *People v. Clair* (1992) 2 Cal.4th 629, 652.) However, once a prima facie case is found, the burden shifts to the prosecution to show the absence of purposeful discrimination. (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 197; *People v. Wheeler*, *supra*, 22 Cal.3d at pp. 281-282.) The California Supreme Court has held: "[A]dequate justification by the prosecutor may be no more than a 'hunch' about the prospective juror [citation], so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias and not simply as 'a mask for race prejudice' [citation]." (*People v. Williams*, *supra*, 16 Cal.4th at p. 664; *People v. Turner*, *supra*, 8 Cal.4th at p. 165.)

The trial court's express acceptance of the prosecutor's legitimate non-discriminatory basis for excusing the four jurors must be upheld on appeal. The trial court made a """"'sincere and reasoned effort' to evaluate the nondiscriminatory justifications offered . . ."""" by the prosecutor. (See *People v. Ervin* (2000) 22 Cal.4th 48, 75, quoting *People v. Arias, supra,* 13 Cal.4th at p. 136.) The trial court's conclusions are therefore entitled to deference. (*People v. Ervin, supra,* 22 Cal.4th at p. 75; *People v. Williams* (1997) 16 Cal.4th 153, 189-190.) The California Supreme Court has held, "The determination whether substantial evidence exists to support the prosecutor's assertion of a nondiscriminatory purpose is a 'purely factual question.'" (*People v. Ervin, supra,* 22 Cal.4th at p. 75; *People v. Alvarez, supra,* 14 Cal.4th at p. 197.) The trial judge's personal observations are critical to distinguishing bona fide reasons for the peremptory challenges from "sham excuses." (*People v. Jones* (1998) 17 Cal.4th 279, 294; *People v. Turner, supra,* 8 Cal.4th at p. 165.) The California Supreme Court has held: "Even seemingly '"highly speculative"' or '"trivial"' grounds may support the exercise of a peremptory challenge. [Citations.]" (*People v. Ervin*, *supra*, 22 Cal.4th at p. 77; *People v. Williams, supra,* 16 Cal.4th at p. 191; *People v. Walker* (1998) 64 Cal.App.4th 1062, 1067 [circumstances prompting the exercise of a peremptory challenge may often be subtle, visual, incapable of being transcribed, subjective, and

even trivial].) Moreover, the California Supreme Court has held, "[P]rospective '[j]urors may be excused based on "hunches" and even "arbitrary" exclusion is permissible, so long as the reasons are not based on impermissible group bias.'" (*People v. Box* (2000) 23 Cal.4th 1153, 1186, fn. 6, quoting *People v. Turner, supra,* 8 Cal.4th at p. 165.) A prosecutor's reliance on a prospective juror's body language indicating a lack of attentiveness is, on appeal, a proper ground for affirming a judgment in the face of a *Wheeler* challenge. (*People v. Jones* (1997) 15 Cal.4th 119, 162, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *People v. Turner*, *supra*, 8 Cal.4th at p. 171; *People v. Montiel* (1993) 5 Cal.4th 877, 909; *People v. Johnson* (1989) 47 Cal.3d 1194, 1219.) The Supreme Court has held: "Because *Wheeler* motions call upon trial judges' personal observations, we view their rulings with 'considerable deference' on appeal. [Citations.] If the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question, we affirm. [Citation.]" (*People v. Howard* (1992) 1 Cal.4th 1132, 1155, citing *People v. Sanders* (1990) 51 Cal.3d 471, 501; see also *People v. Johnson* (2003) 30 Cal.4th 1302, 1325; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1092.)

In this case, the prosecutor gave race-neutral explanations for excusing the four jurors in question. Following the first *Wheeler* motion, the prosecutor noted: "As to [prospective juror No. 6], he said that the police had beaten his dad, that he had been attacked by the police, that he was in a parade where he was attacked by the police and then was wrongly accused of taking a stick to the officer, and that he had been racially profiled and basically harassed by the police on many occasions. [¶] I mean, no sound prosecutor would ever leave somebody like that on. Moreover, he's a law student, and I typically don't keep students. As a general rule I don't like students. I don't like law students because—well, students because they lack life experience, law students in particular because they have a tendency to supplement their judgment as to the law that the court instructs them. [¶] As to [juror No. 0276, prospective juror No. 10], while he did indicate that he might be biased towards the defense, he also suggested that he did not

want to be on the panel, that he didn't feel comfortable being on the panel, that he had a lot of recent experience with crimes and was very emotional about it. [¶] Regardless of which way the person is swayed, I don't want people who are swayed by emotion when we are going to have a lot of scientific evidence. And a person who is taking it personally is not the sort of juror I want. Moreover, he is young. He is a student. He has not had jury experience before. He is single; he has no kids. Basically he lacks the sort of life experience that I like in a juror. [¶] And if you look at all of my challenges, unless there is a prevailing countervailing reason I'm not sticking with any young people or students." The record also reflects that juror No. 0276 had two close friend murdered in a robbery a year earlier. Juror No. 0276 indicated the crime had not been solved and the police had not contacted the victims' close friends. Juror No. 0276 said he did not like dealing with murder and had been thinking about what happened to his friends for the previous two days. Juror No. 0276 indicated he was uncertain that he could not be influenced by this unsolved incident adding, "[A]lso last year I knew of a guy I went to school with who was on trial for killing his father, and so he was found guilty." Juror No. 0276 acknowledged that those experiences would cause both sympathy and bias in this case.

Following the trial court's second prima facie finding, the prosecutor explained: "I'll start with [juror No. 0438]. [¶] First of all, I'm not willing to concede that he's Black." The trial court indicated that it had made that determination. The prosecutor continued: "I was planning to excuse him at the time that he made a statement back in the audience about the fact that he had seen [defense counsel] in trial before, and that he had read the Daily Journal article by [defense counsel], and it happened to be a very positive, even flattering, article. [¶] And in fact, when [defense counsel] was questioning him, he even said tell me about the article. What did you read? Trying to get him to share facts because it was so positive. He merely said—and you can look back at the record—he merely said it was a very nice article. [¶] . . . [¶] The fact that he has seen the defense lawyer in trial, the fact that he's read articles about him, and he seems to

have had a rapport and a very positive impression of him from the beginning, and he doesn't know me at all, I think puts me at a disadvantage. [¶] Moreover, he's represented police in police brutality cases in Compton. He's a Compton City Attorney, so he's obviously had a lot of exposure to that. [¶] And counsel is assuming—as we know there has been an enormous amount of police corruption and charges of brutality, so that the sheriff's department had to take over the city police department. Given he was obviously in the midst of that, I think that could bias him against police officers in this case where officer credibility is crucial. [¶] . . . As to [prospective juror No. 10], first of all, he said that he was assaulted by a [Los Angeles Police Department] officer—obviously [Los Angeles Police Department] is my investigating agency—when he was 16 years old. [¶] And the court asked him, 'Could you put that out of your mind and be fair?' And he said, 'I suppose so.' And those were his exact words, 'I suppose so.' It was not clear. [¶] Moreover, at sidebar we asked his impression of police. He said, 'Some are good. There are a lot of bad apples.' [¶] The statement he made indicated he had a mixed view of police in the past. [¶] He's also served on a hung jury before. I am always skeptical of jurors who are hung jurors or on hung juries. And in fact there's case law supporting the fact that that is a race-neutral reason for excusing someone, the fact they've been on a hung jury before. [¶] And also he said—he made a statement about his experience with his son, and he suggested that he was, you know, going to lean towards one side. Even though he suggested he's going to lean toward the defense, I have to say I'm very skeptical of jurors who tend to prejudge the case based just upon the charges and their emotional experience with those sorts of charges, because I don't want terribly emotional jurors. I want jurors who are rational and analytic and who honestly say they're going to listen to all the evidence presented and not make any judgments before they have it. Just as he jumped to the conclusion that [defendant] may have done this based on the charge, he also may have emotionally jumped to the conclusion that the police were corrupt and dishonest based upon his bad experience with the police that he

told us about. [¶] He's a wild-card juror, and in this case I have to convince all 12, and one wild-card juror could hang the case. It's not a risk I want to take."

The daughter of juror No. 0438 represented Rafael Perez and other police officers in "Rampart-related civil cases." Prospective juror No. 10 indicated that he had been on a hung jury. Prospective juror No. 10 stated the instructions were confusing and the court did not give the jurors enough options to allow them to reach a verdict.

Contrary to defendant's suggestion, an *appellate court* may not engage in a comparative analysis of the reasons proffered by the party exercising the questioned peremptory challenges. In *People v. Ervin, supra,* 22 Cal.4th at page 76, the California Supreme Court held: "The rule is clear in this state, however, that in evaluating the sufficiency of the prosecutor's explanations, a reviewing court will not engage in such a comparative analysis regarding persons the prosecutor accepted. (*People v. Jones, supra,* 15 Cal.4th at p. 162; *People v. Arias, supra,* 13 Cal.4th at p. 136, fn. 16; *People v. Johnson, supra,* 47 Cal.3d at p. 1221.)"

The trial court accepted what were on their face non-racial grounds for excusing the jurors. Once it was satisfied with the reasons given, the trial court was not obligated to conduct further inquiry into the prosecutor's race-neutral explanations. (*People v. Reynoso* (2003) 31 Cal.4th 903, 929; *People v. Jackson* (1996) 13 Cal.4th 1164, 1197-1198; *People v. Johnson, supra,* 47 Cal.3d at p. 1218.) Given the acceptance of the prosecutor's racially neutral explanations for the exercise of the peremptory challenges, which occurred in the context of a sincere effort by the trial court to apply *Wheeler*, no error occurred. Finally, there is no merit to defendant's suggestion any federal constitutional contentions have been preserved for appellate review. (*People v. Garceau* (1993) 6 Cal.4th 140, 173; *People v. McPeters* (1992) 2 Cal.4th 1148, 1174.)

We note the parties have averted to United States Supreme Court decisions discussing impermissible jury selection practices. (See *Purkett v. Elem* (1995) 514 U.S. 765, 773; *Batson v. Kentucky* (1986) 476 U.S. 79, 84-89.) However, defense counsel has never raised any federal constitutional issues in the trial court. Hence, they are waived.

(*People v. Garceau, supra,* 6 Cal.4th at p. 173; *People v. McPeters, supra,* 2 Cal.4th at p. 1174.)

B. Prosecutorial Misconduct

Defendant argues, "The prosecutor below committed misconduct by asking prejudicial questions suggestive of misconduct knowing he had no factual support for them, by repeatedly asking [defendant] to comment on the veracity of the prosecution's witnesses, by continuing with a line of questioning regarding 'gangsta rap' lyrics after the court had sustained an objection and by commenting in argument upon the failure of the defense to call a particular witness." Defendant further argues the prosecutor's conduct violated her constitutional rights to due process, a jury trial and confrontation of witnesses.

In reviewing the principles governing findings of prosecutorial misconduct the California Supreme Court has consistently noted: "'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.]' [Citation.]" (*People v. Hill, supra,* 17 Cal.4th at p. 819, quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Gionis* (1995) 9 Cal.4th 1196, 1214, and *People v. Espinoza* (1992) 3 Cal.4th 806, 820; see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643; *People v. Harris* (1989) 47 Cal.3d 1047, 1083-1084, disapproved on other grounds in *People v. Wheeler* (1992) 4 Cal.4th 284, 299, fn. 10.)

1. Waiver

Preliminarily, the California Supreme Court has held that a reviewing court will generally not review a claim of prosecutorial misconduct unless an objection and request for admonishment was raised at trial, unless an admonitory comment would not have cured the harm. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1155; *People v. Ochoa* (1998) 19 Cal.4th 353, 427; *People v. Samayoa, supra,* 15 Cal.4th at p. 841: *People v. Osband, supra,* 13 Cal.4th at p. 717.) Defendant's prosecutorial misconduct claims have been waived because she failed to either object on those grounds or request a curative admonition. Nor does it appear that any such objections would have been futile. (*People v. Boyette* (2002) 29 Cal.4th 381, 432; *People v. Dennis* (1998) 17 Cal.4th 468, 521.) Notwithstanding those waivers, we find no misconduct occurred.

2. Cross-examination of the defendant

a. references to toilet papering and calls to the Kading household

In cross-examining the defendant, the prosecutor sought to discredit her testimony where it differed from that of Detective Kading. Defendant cites to the prosecutor's questions about the gunshot residue test conducted by Detective Kading. The prosecutor asked, "You told Detective Kading—well, before he took the GSR test, Detective Kading asked you if you had washed your hands, correct?" Defendant responded, "No, sir." The prosecutor continued, "And you told him that you had, didn't you?" Defendant responded, "He never asked me, sir." The prosecutor inquired whether defendant had previously met Detective Kading before Ms. Schmidt was shot. Defendant responded, "No." The prosecutor asked if defendant had ever toilet papered Detective Kading's house. Defense counsel's relevance objection was sustained. The prosecutor then asked, "Did you ever call his wife and tell his wife that he was cheating on her?" Defendant,

responded, "Huh? No, sir." Thereafter, the prosecutor inquired, "Do you know why this police detective who you don't know from Adam would come into this courtroom and take the stand and take an oath and lie about that?" The prosecutor also asked, "Do you know why he would file a false police report in which he says that you told him [sic] that he asked you as a standard question whether you had washed your hands and you told him that you had?" When asked further why Detective Kading would lie in his testimony, defendant responded, "He wasn't telling the truth." The prosecutor then inquired, "You are the one who is telling the truth, right?" Later, outside the presence of the jury, the trial court inquired about the basis for the prosecutor's questions regarding the toilet papering of Detective Kading's home or calls made to his wife. The prosecutor indicated his intent was to show Detective Kading had no reason to lie. The prosecutor explained: "No. I am saying that he would have nothing against [defendant]. He would have no reason to come in here and lie about her. It was a facetious comment." Thereafter, defense counsel's motion for mistrial was denied. However, the trial court found the question improper without a factual basis. The prosecutor apologized and indicated he would ask no further questions of that sort. Thereafter, the trial court admonished the jurors: "Before we resume our cross-examination, let me just discuss something with the jury briefly. [¶] You recall yesterday there were a couple of questions asked by [the prosecutor] of [defendant] involving toilet papering a house and calling Detective Kading's wife. And objections were made to those questions and the objections were sustained. [¶] Let me remind you, Ladies and Gentlemen, that a question in and of itself is not evidence and you are not to consider a question for any purpose if an objection has been sustained as to those questions. The questions were asked without any factual basis, without a basis in fact to ask those questions and you are not to consider those questions for any purpose at all."

The questions asked by the prosecutor were improper. In any event, we presume the trial court's subsequent specific admonition to the jurors cured prejudice arising from the questions. The California Supreme Court has consistently stated that on appeal it is

presumed that the jury is capable of following the instructions they are given. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1337; *People v. Osband, supra,* 13 Cal.4th at p. 714; *People v. Kemp* (1961) 55 Cal.2d 458, 477; *People v. Chavez* (1958) 50 Cal.2d 778, 790; *People v. Foote* (1957) 48 Cal.2d 20, 23; *People v. Thomas* (1994) 26 Cal.App.4th 1328, 1333-1334.)

b. veracity of prosecution witnesses

Defendant argues that the prosecutor continued to ask "factually baseless" questions of defendant regarding the veracity of prosecution witnesses. Defendant argues the prosecutor repeatedly asked defendant whether various witnesses lied when they testified, including Isis Jones, Michael Ellison-Lewis, Nada Nickens, Allen Moore, Irma Edwards, and Carolyn Piles. (See *People v. Foster* (2003) 111 Cal.App.4th 379, 382-385.) In each instance, the prosecutor mentioned specific facts testified to by the specific witness and asked defendant whether that was true. When defendant contradicted that testimony, the prosecutor inquired whether the witness was lying. Even if the questioning was improper, it was but a small part of a lengthy trial. Moreover, even absent the questions, the discrepancies between defendant's various interviews with police and her testimony when compared to that of all the prosecution witnesses were apparent to the jurors. (See *People v. Smithey* (1999) 20 Cal.4th 936, 958-961.) It is unlikely that defendant would have had a more favorable result absent the prosecutor's questions. (*People v. Ochoa, supra,* 19 Cal.4th at p. 466; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

c. rap lyrics

Defendant also argues misconduct occurred when she was questioned about "gangsta rap" lyrics after relevance objections were sustained. On cross-examination,

defendant responded affirmatively to questions regarding the fact that she was a Christian "girl" who sang in the gospel choir and listened to religious music. The prosecutor then inquired about a rap artist named Damu. Defendant denied knowledge of this artist. The prosecutor showed defendant a photograph of her bedroom which depicted a Damu poster on her wall entitled "Banging on Wax, The Best of Damu." The prosecutor then began reciting the lyrics from a Damu song. Defense counsel's objection was sustained. When the prosecutor attempted to finish the lyrics, the trial court said, "Counsel, when an objection is sustained, that means you stop." The prosecutor asked defendant if the lyrics looked familiar. When defendant denied having heard the song, the prosecutor stated, "The fact is Damu is a hard core gangsta rapper who glorifies murder . . . ." Defense counsel's objection was again sustained. The prosecutor then inquired whether the police had to break up a sixteenth birthday party. Defense counsel's objection was again sustained.

Defendant argues that the prosecutor continued with impermissibly prejudicial questions after objections were sustained. In fact, defense counsel objected to the reading of the lyrics. After the objections were sustained, the prosecutor then asked if the lyrics were familiar to defendant. It was not until the prosecutor characterized the recording artist as a "hard core gangsta rapper who glorifies murder" that a further objection was raised. The prosecutor then switched to the topic of defendant's birthday party. The prosecutor's continuation of the reading of the lyrics after the objection was sustained to include a few more words, "And fuck his—" was a serious failure to obey the court's ruling. The same is true for the additional words of "carnage and death" describing the nature of the rap music. The objections and rulings thereon came within midsentence of each of these objectionable statements by the prosecutor. Yet, the misconduct, refusing to obey the order of a judge, were in fact were brief references during a lengthy cross-examination of defendant and were harmless in light of the strong evidence defendant killed Ms. Schmidt. As the trial court noted at the time of the new trial motions: "[T]he net effect of [the trial court's sustaining of the objection] was made the People look bad

actually. I don't think it had any effect on the jury, but frankly looked ridiculous for [the prosecutor] to try and read these gangster lyrics." We agree with this thoughtful and judicious analysis by the trial judge who observed the misconduct and was familiar with the strength and weaknesses of each side's presentation to the jury.

d. closing argument

During closing argument, the deputy district attorney referred to the failure of the defense to call Thomas as a witness. The prosecutor argued this supported on inference Thomas' testimony would have been adverse to the defense. The prosecutor argued: "And this guy Thomas, who potentially might have corroborated part of her story, they don't call him to the stand. The only time you wouldn't call him to the stand is because he doesn't check out." The California Supreme Court has held that a prosecutor may comment during closing argument on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. (*People v. Clair, supra,* 2 Cal.4th at p. 662; *People v. Mincey* (1992) 2 Cal.4th 408, 446; *People v. Fierro* (1991) 1 Cal.4th 173, 213; *People v. Szeto* (1981) 29 Cal.3d 20, 34.) No misconduct occurred.

C. Involuntary Manslaughter Instruction

Defendant argues the trial court improperly refused to instruct the jury on involuntary manslaughter as a lesser-included offense of murder. Defense counsel had argued that because there were no eyewitnesses except defendant, involuntary manslaughter was an appropriate instruction. The trial court noted: "Now as I understand it the People's theory is that [the victim] was going to force a confrontation with [defendant]. So there is evidence of possibly a sudden heat of passion, heat of quarrel, but for an involuntary you have to—you have to have something to show that

she was doing a lawful act that was inherently dangerous. I don't think we have any of that." After further discussion, the trial court concluded there was no evidence to support an involuntary manslaughter instruction.

A trial court is obliged to instruct, even without a request, on the general principles of law which relate to the issues presented by the evidence. (§§ 1093, subd. (f), 1127; *People v. Wims* (1995) 10 Cal.4th 293, 303; *People v. Turner* (1990) 50 Cal.3d 668, 690; *People v. Grant* (1988) 45 Cal.3d 829, 847; *People v. Melton* (1988) 44 Cal.3d 713, 746; *People v. Flannel* (1979) 25 Cal.3d 668, 680-681.) When the evidence is minimal and insubstantial, there is no duty to instruct. (*People v. Barton* (1995) 12 Cal.4th 186, 196, fn. 5; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1232-1233; *People v. Flannel*, *supra*, 25 Cal.3d at p. 684; *People v. Mayberry* (1975) 15 Cal.3d 143, 151.) The California Supreme Court recently reiterated: "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed." (*People v. Breverman* (1998) 19 Cal.4th 142, 162, quoting *People v. Flannel*, *supra*, 25 Cal.3d at p. 684, fn. 12, original italics, and *People v. Carr* (1972) 8 Cal.3d 287, 294; see also *People v. Birks* (1998) 19 Cal.4th 108, 118.)

Section 192 provides in pertinent part: "Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: [¶] . . . [¶] (b) Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. . . ." Defendant cites to two ways the crime of involuntary manslaughter can be committed. The first involves a killing, which occurs during the commission of a misdemeanor which is dangerous to human life under the circumstances. (*People v. Cox* (2000) 23 Cal.4th 665, 675; *People v. Ochoa, supra,* 19 Cal.4th at p. 423; *People v. Wells*

(1996) 12 Cal.4th 979, 980; see *People v. Huynh* (2002) 99 Cal.App.4th 662, 678.) The second way involuntary manslaughter can be committed is when a noninherently dangerous felony is committed without due caution and circumspection. (*People v. Burroughs* (1984) 35 Cal.3d 824, 835, overruled on another point in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 ["[T]he only logically permissible construction of section 192 is that an unintentional homicide committed in the course of a noninherently dangerous felony may properly support a conviction of involuntary manslaughter, if that felony is committed without due caution and circumspection"]; *People v. Albritton* (1998) 67 Cal.App.4th 647, 654 [same].) The reference to "due caution and circumspection" is to criminal negligence. (*People v. Evers* (1992) 10 Cal.App.4th 588, 596; see *People v. Penny* (1955) 44 Cal.2d 861, 879.) Involuntary manslaughter is an unintentional killing. (*People v. Blakeley, supra,* 23 Cal.4th at pp. 90-91; *People v. Hendricks* (1988) 44 Cal.3d 635, 643.) No involuntary manslaughter instructions may be given unless there is substantial evidence the offense was committed. (*People v. Hendricks*, *supra*, 44 Cal.3d at p. 643; *People v. Dixon* (1995) 32 Cal.App.4th 1547, 1557-1558, fn. 5.)

Defendant argues that the evidence "support[s] . . . the theory that the shooting occurred accidentally in the course of the unlawful brandishing of a firearm," thereby justifying an involuntary manslaughter instruction. But no substantial evidence presented at trial would support an involuntary manslaughter instruction. Defendant testified she never shot Ms. Schmidt. In the emergency telephone call to the authorities, defendant claimed to have just gotten home and discovered that Ms. Schmidt had been shot. In each of the three interviews with the detectives, defendant denied actually shooting Ms. Schmidt. Further, we cannot equate an accidental shooting with the fact that Ms. Schmidt was shot four times in the head. (*People v. Hendricks, supra,* 44 Cal.3d at p. 643; *People v. Dixon, supra,* 32 Cal.App.4th at pp. 1556-1557; see *Dickey v. Lewis* (9th Cir. 1988) 859 F.2d 1365, 1371; *McGuinn v. Crist* (9th Cir. 1981) 657 F.2d 1107, 1108; *People v. Jackson* (1989) 49 Cal.3d 1170, 1201; *People v. Bloyd* (1987) 43 Cal.3d 333, 348-349.) The evidence demonstrated that the shooting was intentional rather than

accidental. (*People v. Huynh, supra,* 99 Cal.App.4th at p. 679; *People v. Evers, supra,* 10 Cal.App.4th at pp. 597-598; *People v. Wright* (1976) 60 Cal.App.3d 6, 12-13, disapproved on another point in *People v. Wells, supra,* 12 Cal.4th at p. 988.) The trial court correctly refused to instruct on involuntary manslaughter.

D. Evidentiary Issues

1. Defendant's prior misconduct

Defendant argues that the trial court improperly admitted evidence that she used marijuana. Further, defendant argues the trial court erroneously permitted the jury to consider evidence defendant had a physical altercation with Ms. McBride. Defendant further argues that the trial court abused its discretion under Evidence Code sections 352[2] and 1101.[3]

Defendant filed a pretrial motion to prevent the prosecutor from introducing evidence of the fight with Ms. McBride. The trial court found: "[T]here is a defense motion to exclude the fight that [defendant] had with Ms. McBride indicating that doesn't

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[2] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

[3] Evidence Code section 1101 provides in pertinent part: "(a) Except as provided in this section . . . , evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . . ) other than his or her disposition to commit such an act."

come under [Evidence Code section] 1101(b). [¶] And the court is inclined to allow the People to go into that, not for the reason that it shows a propensity because I don't think that is the reason the People are seeking to introduce it. The issues surrounding [defendant's] being forced to leave Tuskegee are all part of the People's case as well as we have got this other evidence that the People I understand will be seeking to introduce regarding her efforts to obtain a gun, so then her relationship with Ms. McBride is relevant in terms of motive. [¶] So I think I am inclined to admit it assuming it comes in under other properly admissible evidence."

Defendant also moved to exclude reference to her marijuana use pursuant to Evidence Code section 352. The prosecutor argued that evidence at the first trial indicated that Ms. Schmidt knew defendant was smoking marijuana and was unhappy about it. Other evidence showed that defendant was smoking a considerable amount of marijuana on the entire evening of the murder. The prosecutor argued the evidence of marijuana use goes to the tension between defendant and Ms. Schmidt, intoxication, and state of mind. The trial court ruled the evidence admissible.

In *People v. Kipp* (1998) 18 Cal.4th 349, 369, the California Supreme Court held: "Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403 [].)" The California Supreme Court has further held that the trial court's ruling on this issue, relevance, and the question of undue prejudice is reviewed for abuse of discretion. (*People v. Kipp, supra,* 18 Cal.4th at p. 369; *People v. Scheid* (1997) 16 Cal.4th 1, 14; *People v. Alvarez, supra,* 14 Cal.4th at p. 201; *People v. Minifie* (1996) 13 Cal.4th 1055, 1070.)

The trial court did not abuse its discretion in ruling the evidence admissible pursuant to either Evidence Code section 352 or 1101, subdivision (b). The evidence of defendant's altercation with Ms. McBride was relevant. The trial court reasonably could conclude the Tuskegee University expulsion had caused substantial tension between

defendant and Ms. Schmidt. Defendant's fight with Ms. McBride aggravated the simmering relationship with Ms. Schmidt. The evidence of defendant's marijuana use was relevant to show a basis for additional conflict between defendant and Ms. Schmidt. Defendant readily admitted during interviews by the police and at trial, the marijuana use created tension with Ms. Schmidt.

In any event, even if it was error to admit the evidence in question, any such error was harmless. Evidence Code section 353 states: "A verdict or finding shall not be set aside . . . by reason of the erroneous admission of evidence unless: [¶] . . . [¶] (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice." (See *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Anderson* (1987) 43 Cal.3d 1104, 1129-1130, fn. 3.) As set forth previously, the evidence defendant shot Ms. Schmidt was overwhelming. Therefore, it is not reasonably probable that defendant would have received a more favorable result if the challenged evidence had been excluded. (*People v. Ayala* (2000) 23 Cal.4th 225, 271; *People v. Sakarias* (2000) 22 Cal.4th 596, 630.)

2. Defendant's adoption

Defendant argues the trial court improperly admitted evidence that she was adopted because what little probative value it had was outweighed by his prejudicial impact. When defendant's pretrial motion to exclude evidence of her adoptive status was heard, the trial court ruled, "It does have some modicum of relevance and the court will allow that to be admitted." The circumstances of the murder were so egregious that defendant's status as an adopted child was a matter of no consequence. Any purported error in the admission of such evidence was harmless in light of the strong evidence defendant shot Ms. Schmidt. (*People v. Ayala, supra,* 23 Cal.4th at p. 271; *People v. Sakarias, supra,* 22 Cal.4th at p. 630.)

3. Impeachment of Mr. Ellison-Lewis

Defendant argues the trial court improperly refused to allow her to use Mr. Ellison-Lewis's misdemeanor forgery conviction to impeach his credibility. In *People v. Wheeler, supra,* 4 Cal.4th at pages 296 through 297, the California Supreme Court held: "In general, a misdemeanor—or any other conduct not amounting to a felony—is a less forceful indicator of immoral character or dishonesty than is a felony. Moreover, impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present. Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (Fn. omitted; accord, *People v. Cloyd* (1997) 54 Cal.App.4th 1402, 1408.) We review the admissibility of moral turpitude non-felony conduct for an abuse of discretion. (*People v. Ayala, supra,* 23 Cal.4th at p. 301; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1052.)

Here, the trial court held: "In terms of the misdemeanor conduct of the forgery, we have to get into—not the conviction itself or the plea itself, but actually get into the events surrounding the conduct amounting to a misdemeanor. I think that is going to take up far more time than is useful for the limited purpose that this witness is being called for impeachment of that witness, so therefore, under [Evidence Code section] 352 analysis the court has weighed the probative value of that and we're not going to get into the misdemeanor conviction for forgery." No abuse of discretion occurred. (*People v. Ayala, supra,* 23 Cal.4th at p. 301; *People v. Carpenter, supra,* 21 Cal.4th at p. 1052; *People v. Williams* (1996) 46 Cal.App.4th 1767, 1779-1780; *People v. Hill* (1995) 34 Cal.App.4th 727, 738.) Moreover, Mr. Ellison-Lewis's testimony was limited. He testified defendant told him: Ms. McBride lied at the hearing regarding defendant's suspension; defendant beat Ms. McBride; and Ms. Schmidt refused to pay for defendant's

transportation home from Tuskegee, Alabama. Moreover, any error in excluding evidence of his misdemeanor forgery conviction was harmless in light of strong evidence defendant shot Ms. Schmidt. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1089; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103; *People v. Cudjo* (1993) 6 Cal.4th 585, 611.)

## IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

ARMSTRONG, J.

MOSK, J.